

No. 14910

United States
Court of Appeals
for the Ninth Circuit

CHARLES COX and ALBERT EARL JONES,
Appellants,
vs.

AGNES H. REMILLARD, Administratrix of the
Estate of Edward S. Remillard, Deceased,
Appellee.

Transcript of Record

Appeal from the United States District Court
for the District of Oregon.

FILED

JAN - 3 1955



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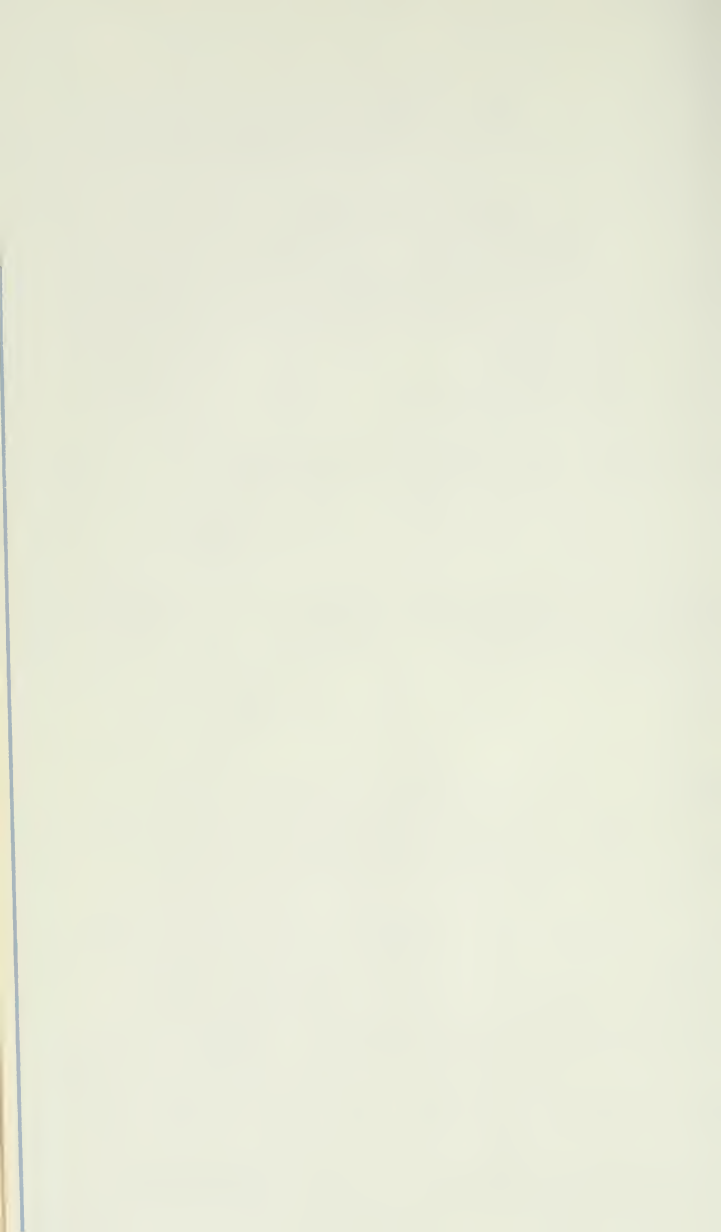
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INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

| | PAGE |
|---|------|
| Answer | 5 |
| Attorneys, Names and Addresses of..... | 1 |
| Certificate of Clerk | 41 |
| Complaint | 3 |
| Exhibit, Plaintiff's | |
| No. 1—Statement of Funeral Expenses.... | 41 |
| | |
| Findings of Fact and Conclusions of Law | 10 |
| Judgment | 13 |
| Memorandum of Decision | 10 |
| Notice of Appeal | 17 |
| Objections to Findings of Fact and Conclusions of Law and Judgment | 14 |
| Order Overruling Objections to Findings of Fact and Conclusions of Law and Judgment..... | 16 |
| Pretrial Order | 6 |
| Statement of Points on Which Appellants Intend to Rely on Appeal | 44 |
| Transcript of Proceedings | 18 |

Witnesses:

Daley, Edith

—direct 2

—cross 2

Daley, Floyd

—direct 1

—cross 2

Remillard, Agnes H.

—direct 3

—cross 3

—redirect 4

Remillard, Edward S.

—direct 2

—cross 3

NAMES AND ADDRESSES OF ATTORNEYS

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For Appellants.

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WILLIAM H. HEDLUND,
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For Appellee.

In the District Court of the United States
for the District of Oregon
Civil No. 7891

AGNES H. REMILLARD, Administratrix of the
Estate of Edward S. Remillard, Deceased,
Plaintiff,

vs.

CHARLES COX and ALBERT EARL JONES,
Defendants.

COMPLAINT

Comes now the plaintiff and for cause of action
against the defendants alleges:

I.

That plaintiff is a citizen of the State of Oregon
and is the duly appointed, qualified and acting ad-
ministratrix of the estate of Edward S. Remillard,
deceased, and defendants are citizens of the State
of Washington. That said Edward S. Remillard
was at the time of his death a citizen of the State
of Montana. That the matter in controversy exceeds,
exclusive of interest and costs, the sum of Three
Thousand Dollars (\$3,000.00).

II.

That on December 6, 1954, the defendant, Albert
Earl Jones, was operating a motor vehicle owned
by defendant Charles Cox in a westerly direction
on U. S. Highway No. 30 at a point approximately
1½ miles west of the City of The Dalles, in the
County of Wasco, State of Oregon, and at said time

and place defendants negligently drove said motor vehicle against and into the rear end of an automobile in which Edward S. Remillard was riding as a passenger.

III.

That at said time and place the defendant, Albert Earl Jones, was operating said motor vehicle within the course and scope of his authority and employment as servant, agent and employee of defendant Charles Cox.

IV.

That as a result Edward S. Remillard was thrown in and about said automobile and sustained injuries which resulted in his death.

V.

That said Edward S. Remillard at the time of said collision, injury and death was three years of age and left surviving neither widow or surviving dependents and the plaintiff maintains this action as the administratrix of his estate for the benefit of his estate.

Wherefore, plaintiff demands judgment against defendants, and each of them, in the sum of \$20,000.00 and costs.

/s/ ARTHUR S. VOSBURG,

/s/ WILLIAM H. HEDLUND,

/s/ FRANK BOSCH,

Attorneys for Plaintiff.

[Endorsed]: Filed January 6, 1955.

[Title of District Court and Cause.]

ANSWER

For their answer to plaintiff's complaint the defendants admit and deny as follows:

I.

Defendants admit that on or about December 6, 1954, the defendant, Albert Earl Jones, was operating a motor vehicle on U. S. Highway No. 30 and that the vehicle he was operating collided with the vehicle in which Edward S. Remillard was a passenger. Defendants further admit that Edward S. Remillard sustained injuries which resulted in his death.

II.

Except as herein expressly admitted, the defendants deny the allegations contained in plaintiff's complaint.

Wherefore, defendants pray that plaintiff take nothing on her complaint and that defendants recover their costs and disbursements incurred herein.

COLLIER, BERNARD, BERNARD & EDWARDS,

/s/ WILLIAM F. BERNARD,

/s/ EDWIN L. DUNNAVAN,

Attorneys for Defendants.

Service of copy acknowledged.

[Endorsed]: Filed February 14, 1955.

[Title of District Court and Cause.]

PRETRIAL ORDER

On April 11, 1955, the above case came on regularly for pretrial conference before the undersigned Judge of the above-entitled court. The plaintiff appeared by and through one of her attorneys, Frank McK. Bosch, and the defendants appeared by and through one of their attorneys.

Admitted Facts

The following facts have been agreed upon by the parties and require no proof:

I.

That plaintiff is a citizen of the State of Oregon and is the duly appointed, qualified and acting administratrix of the estate of Edward S. Remillard, deceased, and defendants are citizens of the State of Washington. That said Edward S. Remillard was at the time of his death a citizen of the State of Montana. That the matter in controversy exceeds, exclusive of interest and costs, the sum of Three Thousand Dollars (\$3,000.00).

II.

That on or about December 6, 1954, the defendant, Albert Earl Jones, was operating a 1948 Peterbilt tractor and attached semi-trailer, owned by defendant Charles Cox, in a westerly direction on U. S. Highway No. 30 at a point approximately 1½ miles west of the City of The Dalles in the County of

Wasco, State of Oregon, and at said time and place said 1948 Peterbilt truck collided with a vehicle in which Edward S. Remillard was riding as a passenger.

III.

That at said time and place Albert Earl Jones was operating said 1948 Peterbilt truck within the course and scope of his authority and employment as the servant, agent and employee of defendant Charles Cox.

IV.

That as a result of said collision Edward S. Remillard sustained injuries which resulted in his death.

V.

That said Edward S. Remillard at the time of said collision, injury and death was three years of age and left surviving neither widow or surviving dependents and the plaintiff maintains this action as the administratrix of his estate for the benefit of his estate.

VI.

That Edward S. Remillard at the time of his death had a life expectancy of 61 years.

Plaintiff's Contentions

I.

That at said time and place defendants were negligent in the following respects:

(1) They failed and neglected to keep a proper or any lookout for vehicles on U. S. Highway No.

30 and particularly the automobile in which Edward S. Remillard was riding as a passenger;

(2) They operated their vehicle at a speed greater than was reasonable and prudent having due regard to the traffic and other conditions then and there existing;

(3) They failed and neglected to have, keep and maintain their vehicle under proper or any control.

II.

That as a direct and proximate result of the defendant's negligence as aforesaid the estate of plaintiff's intestate was damaged in the sum of Twenty Thousand Dollars (\$20,000.00), including reasonable funeral and burial expenses in the sum of Two Hundred Thirty-eight Dollars (\$238.00).

Defendants deny the foregoing.

Defendants' Contentions

I.

Defendants contend that they were not negligent in any of the particulars alleged.

Physical Exhibits

The following exhibits have been enumerated and identified, the parties agreeing with the approval of the court that no further identification is required, the same being subject to objection only upon the grounds of irrelevancy, incompetency and immateriality:

Plaintiff's Exhibits:

- (1) Statement of expenses incurred for the funeral and burial of Edward S. Remillard;
- (2) Photographs of automobile in which Edward S. Remillard was riding taken after the collision;
- (3) Drawing of the scene of the collision (reserved);
- (4) Deposition of defendant Albert Earl Jones.

Defendants' Exhibits:

- (1) Photographs of defendants' motor vehicle taken after the collision (reserved);
- (2) Photographs of automobile in which Edward S. Remillard was riding taken after the collision (reserved);
- (3) Photographs of scene of accident;
- (4) Deposition of Floyd Daley;
- (5) Deposition of Edith R. Daley.

Jury Trial

Neither party has made a request for a jury trial.

The parties hereto agree to the foregoing pretrial order, and the court being fully advised in the premises,

Now Orders the foregoing pretrial order shall not be amended except upon the consent of both parties or to prevent manifest injustice.

Dated at Portland, Oregon, this 24th day of May, 1955.

/s/ CLAUDE McCOLLOCH,
Judge.

Approved:

/s/ FRANK McK. BOSCH,
Of Attorneys for Plaintiff.

/s/ WILLIAM F. BERNARD,
Of Attorneys for Defendants.

/s/ JOHN D. RYAN,
Of Attorneys for Defendants.

[Endorsed]: Filed May 24, 1955.

[Title of District Court and Cause.]

MEMORANDUM OF DECISION

In Lane v. Hatfield (1943) the Oregon Supreme Court approved a judgment of \$5,000.00 in the case of a seven-year-old girl. I have arrived at the amount allowed here by adding 50% on account of the difference in sex and 50% for difference in value of money, total \$10,000.00.

Dated June 3, 1955.

/s/ CLAUDE McCOLLOCH,
Judge.

[Endorsed]: Filed June 3, 1955.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled cause came on regularly for trial before the Honorable Claude McColloch, judge of the above-entitled court, on May 24, 1955, a jury

having been waived by both of the parties, plaintiff appearing in person and by her attorneys, William H. Hedlund and Frank McK. Bosch, defendants appearing in person and by their attorneys, John D. Ryan, John Gavin and Edwin L. Dunnavan. After opening statements by respective counsel witnesses were sworn and testified and the court having heard and considered the evidence and the closing arguments of respective counsel and being fully advised in the premises, makes the following

Findings of Fact

I.

That on December 6, 1954, the plaintiff's intestate, Edward S. Remillard, while riding as a passenger in an automobile operated by Floyd Daley in a westerly direction on U. S. Highway No. 30 at a point approximately 1½ miles west of the City of The Dalles, in the County of Wasco, State of Oregon, sustained injuries which resulted in his death when said automobile was struck from the rear by a 1948 Peterbilt tractor and attached semi-trailer, owned by defendant Charles Cox and operated by defendant Albert Earl Jones.

II.

That the aforementioned injuries which resulted in the death of plaintiff's intestate were caused by the negligence of the defendants in that defendants failed to keep a proper lookout, failed to have their vehicle under proper control, and operated their vehicle at a speed greater than was reasonable and

prudent under the conditions then and there existing.

III.

That as a direct and proximate result of the aforementioned negligence on the part of the defendants, and each of them, plaintiff's intestate sustained injuries which resulted in his death, all to plaintiff's damage in the sum of \$.....

IV.

That as a result of said accident plaintiff was obliged to incur expenses for the funeral and burial of Edward S. Remillard in the sum of \$238.00.

Based upon the above findings of fact the court deduces the following

Conclusions of Law

The plaintiff is entitled to recover judgment against the defendants, and each of them, in the sum of \$10,000, general damages, and \$238.00, special damages.

Dated at Portland, Oregon, this 3rd day of June, 1955.

/s/ CLAUDE McCOLLOCH,
Chief Judge.

[Endorsed]: Filed June 3, 1955.

In the District Court of the United States
for the District of Oregon

Civil No. 7891—103-141

AGNES H. REMILLARD, Administratrix of the
Estate of Edward S. Remillard, Deceased,

Plaintiff,

vs.

CHARLES COX and ALBERT EARL JONES,

Defendants.

JUDGMENT

This matter coming on to be heard on the motion of plaintiff for judgment in the above-entitled action based on Findings of Fact and Conclusions of Law rendered by this court, and it appearing to the court that plaintiff is entitled to a judgment herein, and the court being fully advised in the premises;

Now, Therefore, based upon the Findings of Fact and Conclusions of Law, proceedings and evidence adduced herein,

It Is Hereby Ordered and Adjudged that plaintiff have and recover of and from the defendants, Charles Cox and Albert Earl Jones, and each of them, the sum of \$10,238.00;

It Is Further Ordered and Adjudged that plaintiff have and recover from defendants, and each of them, her costs and disbursements taxed at \$189.70 and that execution issue therefor.

Dated at Portland, Oregon, this 7th day of June 1955.

/s/ CLAUDE McCOLLOCH,
Chief Judge.

[Endorsed]: Filed June 7, 1955.

[Title of District Court and Cause.]

OBJECTIONS TO FINDINGS OF FACT AND
CONCLUSIONS OF LAW AND JUDGMENT

Come now the defendants herein, by John D. Ryan of their attorneys, and object to the Findings of Fact and Conclusions of Law and Judgment herein as follows:

1. That Finding of Fact II is clearly erroneous in that there was no substantial or any evidence to support the finding that defendants were negligent by reason of failure to keep a proper lookout, failure to have their vehicle under proper control, and that said vehicle was operated at a speed greater than was reasonable and prudent under the conditions then and there existing.

2. That Finding of Fact III is clearly erroneous in that there is no substantial or any evidence to support said finding that the injuries and death sustained by plaintiff's intestate are the direct and proximate result of negligence on the part of defendants.

3. That the Conclusion of Law and Judgment herein awarding damages in the sum of \$10,238 is excessive and said conclusion is not supported by substantial or any evidence.

4. That judgment in the sum of \$10,238 in addition to being excessive, as stated herein, is in excess of the amount awarded by the trial court in its memorandum opinion which awarded damages in the total sum of \$10,000 and is therefore clearly erroneous in that the same exceeds the finding of the trial court in its own memorandum of decision.

5. That the court erred in not finding that the sole and proximate cause of the injuries sustained by plaintiff's intestate and his death was the negligence of the driver of the vehicle in which plaintiff's intestate was a passenger at the time said injuries were sustained.

6. That the judgment against defendant Charles Cox is not supported by substantial evidence herein and the law applicable thereto.

7. That the statute, giving rise to plaintiff's cause of action herein 30.120 O R S provides no standard in the instant case from which damages can be assessed and that the finding of damage in this case was based upon no substantial evidence or evidence of such a vague and speculative nature that the finding of damages in excess of the funeral expenses of \$238.00 constitutes a deprivation of property without due process of law in violation of

the Fourteenth and Fifth amendments of the Constitution of the United States of America.

/s/ JOHN D. RYAN,

RYAN & PELAY,

Attorneys for Defendants.

Service of copy acknowledged.

[Endorsed]: Filed June 16, 1955.

[Title of District Court and Cause.]

ORDER OVERRULING OBJECTIONS TO
FINDINGS OF FACT AND CONCLUSIONS
OF LAW AND JUDGMENT

This matter having come on to be heard before the undersigned Judge on the 11th day of July, 1955, on the objections to findings of fact and conclusions of law and judgment filed herein by defendants, and the court having heard arguments of respective counsel and being fully advised in the premises;

Now, Therefore, It Is Hereby Ordered that defendants' objections to findings of fact and conclusions of law and judgment as filed herein are overruled.

Dated this 11th day of July, 1955.

/s/ CLAUDE McCOLLOCH,
Chief Judge.

[Endorsed]: Filed July 13, 1955.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given, that Charles Cox and Albert Earl Jones, the defendants above named, hereby appeal to the United States Court of Appeals for the Ninth Circuit from each and every part and from the whole of the final judgment entered in this action on June 7, 1955, as corrected by order entered July 7, 1955, and from the final order entered July 11, 1955, overruling said defendants' timely motion objecting to the Findings of Fact, Conclusions of Law and Judgment.

/s/ T. H. RYAN,

RYAN & PELAY,

Attorneys for Defendants.

Service of copy acknowledged.

[Endorsed]: Filed August 8, 1955.

United States District Court, District of Oregon

Civil No. 7891

AGNES H. REMILLARD, etc.,

Plaintiff,

vs.

CHARLES COX and ALBERT EARL JONES,

Defendants.

TRANSCRIPT OF PROCEEDINGS

Tuesday, May 24, 1955, A.M.

Before: Honorable Claude McColloch, Chief Judge.

Appearances:

WILLIAM H. HEDLUND, and
FRANK McK. BOSCH,

Attorneys for Plaintiff.

JOHN D. RYAN,
EDWARD DUNNAVAN,
JOHN GADIN,

Attorneys for Defendants.

* * *

FLOYD DALEY

produced as a witness on behalf of Plaintiff, being first duly sworn, was examined and testified as follows. [2*]

Direct Examination

By Mr. Bosch:

* * *

Q. Mr. Daley, the little boy, Eddie Remillard, he would be related to you as a nephew, would he not?

A. Right.

Q. His mother and your wife are sisters?

A. That is correct.

Q. How long had you known Eddie?

A. Five to six months.

Q. During that period of time did you see him often?

A. Quite often in the latter part of the——

Q. You say the latter part; a matter of months or weeks? A. Last three months.

Q. And how often would you say you saw him in those last three weeks?

A. Two or three times a week.

Q. I misspoke myself, I think, Mr. Daley, I should have said in the last three months. You say that you saw him [14] approximately two or three times a week during those last three months?

A. That is right.

Q. Excuse me. During that period of time did you have occasion to observe his health and his mentality and general fitness? A. I did.

Q. Did he appear to be healthy, a normal boy?

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

(Testimony of Floyd Daley.)

A. To the best of my knowledge, yes.

Q. Did you observe him playing with other children? A. Yes.

Q. And did he seem to get along all right and be just like every other child? A. Yes.

Q. Was he a bright and alert boy or——

A. Apparently so.

Q. Did he during that period of time have any serious sickness that you recall? A. None.

Q. Did he appear to be healthy? A. Yes.

Mr. Bosch: I think that's all.

Cross-Examination

By Mr. Dunnavan:

Q. Mr. Daley, where did this Remillard boy live? [15] A. At what time?

Q. At the time you knew him for the five or six months.

A. Well, when I first knew him, he was out on a visit from Montana with his mother.

Q. At the place that you live?

A. He was visiting relatives in Oregon.

Q. Relatives in Oregon? A. Yes.

Q. Where was that?

A. Umatilla, Hermiston, The Dalles.

Q. How old was he then?

A. Around three.

Q. And how often did you see him then when he was in Umatilla and Hermiston?

A. Week ends.

(Testimony of Floyd Daley.)

Q. On week ends? A. Yes.

Q. How many? A. Three.

Q. All right. Now, where else did you see Eddie in the five or six months?

A. Around The Dalles.

Q. And did he live there at The Dalles then?

A. Yes.

Q. Where was that, Mr. Daley? [16]

A. His mother was out to the—brought him and they stayed at several different places.

Q. Stayed at several. Were they visiting there?

A. Well, I wouldn't say for sure because it started as a visit and didn't end quite as a visit.

Q. Well, did they visit you? I mean, did this boy live with you at all? A. No.

Q. You had only known him for the last five or six months before this accident? A. Yes.

Q. Do you know where he was born?

A. From what I have been told he was born at Glendive, Montana.

Q. I see. And what was it that you said, he was alert and bright and did the things other children his age did? What specifically was it that he did or you observed that leads you to give us that conclusion, Mr. Daley? Can you give us an example or an idea of what he did or said upon which you base your conclusions?

A. There in a case like that I cannot see that there can be any specific item or thing.

Q. How many times do you think you actually

(Testimony of Floyd Daley.)

saw the boy the five or six months that he was there? A. 50 times or better.

Q. Was he living the day of the accident with his mother? [17]

A. With his mother who was living on Route 3, The Dalles.

Q. Route 3, The Dalles? A. Yes.

Q. Was she working in The Dalles?

A. No.

Q. Where did she live?

A. On Route 3, which is approximately 10 miles from The Dalles.

Q. In what direction? A. Southeast.

Q. Southeast. And how long had Mrs. Remillard and her son been living at that address before the accident? A. Over two months.

Q. Whose place was this?

A. The place belonged to a man by the name of Cooper.

Q. Cooper? A. I believe that was it.

Q. Was that the home of this boy and his mother at the time?

A. No, it was not Cooper; it was Foster. C. Foster was the man's name.

Q. C. Foster. Did Mrs. Remillard work there?

A. Not for Foster.

Q. Where was she employed?

A. She was keeping house for my brother.

Q. For your brother? A. Yes. [18]

Q. I see. Well, the reason I am asking this is to notice that in the Complaint it is claimed that the

(Testimony of Floyd Daley.)

child resided in Montana, was a resident of Montana for whom this action was brought and do you know whether or not the child had a home in Montana? A. His father was still in Montana.

Q. His father was in Montana? A. Yes.

Q. All right. In any event, you picked up this boy this day around—went out in the morning to visit, as I understand it, Mr. Daley? A. Yes.

Q. And the boy wanted to come home with you, is that the idea? A. Yes.

Q. Where had you got this car you were driving? A. I borrowed it from my brother.

Q. And when had you borrowed it?

A. About a week before.

Q. What brother is this you borrowed it from?

A. George Daley.

Q. George Daley. Where did he live?

A. I believe he had just moved to 1212 East 10th.

Q. Oh. He lived up in The Dalles?

A. Yes. [19]

* * *

EDITH DALEY

produced as a witness on behalf of the plaintiff being first duly sworn, was examined, and testified as follows: [41]

Direct Examination

By Mr. Bosch:

* * *

Q. The little boy, Eddie, who was killed, how long had you known him?

A. Since he was about—oh, I'd say—six weeks old. [44]

Q. And do you know where he was born?

A. Glendive, Montana.

Q. Where did you see him when he was six weeks old? A. In Glendive.

Q. And he was living with whom at that time?

A. With Mr. and Mrs. Remillard.

Q. Was Eddie their natural child?

A. No; he was not.

Q. Now, how long a period of time just prior to the accident had you seen Eddie? Let me put it differently. How often would you see Eddie, say in the last six months of his life?

A. Quite regularly.

Q. When you say "quite regularly," would that be a matter of every week or every month or—

A. Well, I spent part of the summer in Glendive—

Q. I see. Is that—

A. —at the Remillard home.

Q. Summer of last year? A. Pardon?

(Testimony of Edith Daley.)

Q. Summer of last year?

A. Yes, and Mrs. Remillard was up at my place.

Q. Your place where?

A. In Billings. Montana.

Q. I see. Well, during this period shortly before the death, did he appear from your observation and association with him [45] to be bright, alert, normal? A. Exceptionally so.

Q. I don't know whether I understood your answer to a previous question but when I was asking you about it, I think I asked you whether Eddie was the natural child of Mr. and Mrs. Remillard and what was your answer? A. No.

Q. Was he adopted?

A. He was an adopted child. [46]

* * *

Cross-Examination

By Mr. Dunnavan:

* * *

Q. Now, you had seen this boy when he was six weeks old, [50] as I understand it, in Montana?

A. Eddie, you mean?

Q. Eddie, I mean. A. Yes, sir.

Q. Was this before or after he had been adopted?

A. It was before he had been adopted but it was after Mr. and Mrs. Remillard had taken him.

Q. I see. And then you did not see him again, I take it, until he came with Mrs. Remillard to the State of Oregon?

(Testimony of Edith Daley.)

A. No; you are mistaken. I lived in Montana too. We—I lived in Billings, Montana, for a long time.

Q. Well, did you and Mr. Daley live in Montana while this boy—from the time he was six weeks on?

A. No. Mr. Daley wasn't in Montana all the time.

Q. I see. Well, you saw the boy quite often, then, did you, Mrs. Daley? A. Yes, sir; I did.

Q. And you saw him in Oregon, then, over the last six months before this accident?

A. I had seen him in Oregon since October.

Q. October? A. Yes.

Q. Is that when he came here?

A. No; that's when I came here.

Q. When you came here? [51] A. Yes.

Q. You came from Montana to here?

A. Yes; I did.

Q. I see. Now, was the boy's mother and father with him here in Oregon when he was here then?

A. His mother was; his father came later. [52]

* * *

EDWARD S. REMILLARD

a witness for the plaintiff, was sworn and testified as follows:

Direct Examination

By Mr. Bosch:

Q. Mr. Remillard, you are the father of the little boy that was killed, are you not?

A. Yes, sir.

Q. Your name is the same? A. Yes, sir.

Q. Was he a junior and you a senior?

A. He was third.

Q. He was third? A. Yes.

Q. You are the junior?

A. I am the junior.

Q. Where do you live, Mr. Remillard?

A. In The Dalles.

Q. Do you have any other children?

A. No, sir.

Q. How long have you and your wife been married?

A. We was married July the 1st of 1946.

Q. 1946. That was about nine years, almost?

A. Yes, sir.

Q. Did you ever have any children during your marriage? A. No, sir. [56]

Q. I understand from testimony of Mrs. Daley that Eddie was adopted? A. That is right.

Q. In what jurisdiction was he—was the adoption proceedings?

A. Well, I can't tell you what District Court but it was in the eastern court in Montana; I believe it's the 7th District Court in Montana.

(Testimony of Edward S. Remillard.)

Q. Do you remember the day that he was born?

A. He was born the 21st of October, 1951.

Q. Do you remember—

A. Or 24th, excuse me. 24th of October.

Q. —do you remember the day that you finally got the adoption decree which made him yours?

A. I do not for sure; it was some time in February of 1952.

Q. I see. During his life did he have any serious illnesses? A. No. He was very healthy.

Q. Did he ever sustain any injury? Did he fall and hurt himself seriously at all? A. No, sir.

Q. Well, then, when did you first see him after he was born?

A. He was three days old when we got him.

Q. And you have had him continuously ever since? A. Yes.

Q. During the period between the time he was born and the time the adoption decree was entered, why, I assume the boy [57] was living with you at that time?

A. Yes; due to the fact his parents deserted him we had to wait one year to get legal custody.

Q. I see. Tell us something about—well, to describe Eddie, whether he was alert or helpful? What did he do?

A. Well, about the time he got old enough so he could walk around he used to come—the minute he come in the house he would walk over and turn the radio on and then a little later on I used to do a little radio servicing in my spare time and he got

(Testimony of Edward S. Remillard.)

so that he would come up there and help me. As a matter of fact, toward the last few months he was with me he had a stool that he worked at the bench with me. He would set and watch me work. And I was building another house alongside of the home that I have there and he had his nails there and his little hammer. Of course, naturally, why, he wasn't driving them into very much wood but he was driving them into the edge of the keg which was a wooden box—I mean, we get some of our nails in wooden boxes now—and just before him and his mother came out here to Oregon, why, I was laying up a brick chimney and it was very warm and the heat from the brick was sucking all the moisture from the mortar so you couldn't place it so I was soaking them in a tub of water there and he was bringing the brick over to the tub and throwing them in the tub. I says, "Eddie, don't throw them in the tub," I says, "lay them in there because you are [58] chipping the corners of them. So, after that he picked them up and laid them in there. But he was with me whenever I was home and around me working—that is, I mean, as little guys will do.

Q. Well, he appeared—I appreciate you are the father, you're probably prejudiced—but he was, so far as you could tell, a bright and alert and normal, healthy boy?

A. Very much so, I would say.

Mr. Bosch: I think that's all.

(Testimony of Edward S. Remillard.)

Cross-Examination

By Mr. Dunnavan:

Q. Mr. Remillard, what is your age, sir?

A. I am 37.

Q. 37. This boy was born on what date, I didn't catch that, sir?

A. 24th of October, 1951.

Q. 1951? A. Yes.

Q. In Glendive, Montana?

A. In Glendive, Montana.

Q. And he was deserted by his natural parents right after birth, evidently?

A. Well, maybe I should clarify that. They turned him over to us, they delivered the boy to us and then deserted him before we got into court to get legal procedure. [59]

Q. Is this child related to you in any way, Mr. Remillard?

A. No, sir.

Q. His natural parents are strangers so far as you—

A. Never seen them before.

Q. Blood relationship?

A. Never seen them before.

Q. I see. Now, you had the child, then, at Glendive, Montana?

A. Yes, sir.

Q. From the time he was three days old?

A. Yes, sir.

Q. What is your occupation?

A. I am a carpenter.

Q. Carpenter? A. Yes.

Q. And what has been your education?

(Testimony of Edward S. Remillard.)

A. Eighth grade.

Q. Where did you attend school?

A. Wibaux, Montana.

Q. Where? A. Wibaux, Montana.

Q. Are you a native of Montana?

A. Yes, sir.

Q. And your wife, too?

A. She was born and raised in Montana.

Q. Born and raised there. What education does Mrs. Remillard [60] have?

A. Postgraduate of high school.

Q. Of high school? A. One year.

Q. I gather that this child had not been with you during all of his lifetime from those three days up until the time of this accident, Mr. Remillard?

A. No; I can't give you the exact date. Some time in August him and his mother came out here.

Q. August of what year? A. Of 1954.

Q. Of 1954? A. Yes.

Q. Now, that would mean, then, that he would have been three years old that fall when he came out? A. That's right.

Q. Where were you employed during the time that you lived in Glendive?

A. Well, I was variously employed. I worked for a contractor by the name of Robison and then I had a business of my own. And, the last year, well, the biggest share of the last two years I was employed by Sirhan Construction Company.

Q. Have you always lived at Glendive?

A. No, sir.

(Testimony of Edward S. Remillard.)

Q. What different places have you lived in, say from the [61] time that you left Glendive?

A. Well, you see, I was born and raised at Wibaux. I'd just went back to Glendive in the last five years; that's where my father lives at the present. I—I left Wibaux and I went up in Northern Montana. I went from Billings, went to Billings later on. 1941 I came to Oregon.

Q. No. I am sorry, sir. I am only concerned from the time that the boy came to you three days after birth. You were in Glendive. What other places have you lived besides Glendive since then?

A. Oh, well—The Dalles, Oregon.

Q. You worked in Glendive from 1951 till you came to The Dalles? A. Yes, sir.

Q. When did you come to The Dalles?

A. I would say it was the 27th of January. I am sure.

Q. Yes. Of 1955? A. That's right.

Q. How are you employed now, Mr.—

A. I am employed by The Dalles powerhouse contractors.

Q. You do carpenter work, do you?

A. Yes, sir.

Q. Is your wife employed? A. No, sir.

Q. Were you and Mrs. Remillard separated at the time she came here in 1954? [62]

A. We were at that time.

Q. She brought the child with her?

A. Yes, sir.

Q. Can you tell me what city or town the court

(Testimony of Edward S. Remillard.)

was located in at which this decree of adoption was entered? A. Glendive, Montana.

Q. At Glendive?

A. And I won't swear for sure but I think it's the 7th District Judicial Court.

Q. Where do you and Mrs. Remillard live now?

A. 514 Liberty in The Dalles.

Q. Is that a home that you own or rent or what?

A. It's a rental.

Q. Rental home?

A. Yes. I am staying with my cousin.

Q. You are staying with a cousin?

A. Yes.

Q. You mean, the cousin owns the home?

A. The cousin is renting the home.

Q. I am sorry.

A. The cousin is renting the home—the apartment.

Q. I see. And you live with the cousin?

A. That's right.

Q. You and Mrs. Remillard?

A. That's right. [63]

Mr. Dunnavan: That's all.

Mr. Bosch: That's all, Mr. Remillard. Thank you. [64]

AGNES H. REMILLARD

plaintiff, being first duly sworn, was examined, and testified as follows:

Direct Examination

By Mr. Bosch:

Q. Will you give us your name, please?

A. Agnes H. Remillard.

Q. And you are the wife of Edward S. Remillard who just testified?

A. The wife.

Q. The wife?

A. Yes, sir.

Q. And you are Eddie's mother by adoption?

A. Yes, sir.

Q. I will make this as brief as I can, Mrs. Remillard. The boy was with you the day that he died?

A. Yes.

Q. And he had been with you?

A. Had been with me.

Q. Was he generally healthy?

A. Yes, sir.

Q. Had he had any serious childhood illnesses?

A. No; he had not.

Q. I assume he had the ordinary colds and so forth?

A. Oh, he had a cold once in a while. I think he had the measles. But there was nothing that held him down. [65]

Q. I see. Did he get along well with the other children?

A. Very much.

Q. And enjoy playing with them?

A. Yes.

Q. There wasn't—his hearing and his ability to see and observe, and what not, was all regular?

A. Yes, sir.

(Testimony of Agnes H. Remillard.)

Q. He hadn't been under the treatment of a doctor for any particular deficiency or what not?

A. No, sir.

Q. I appreciate he was only three years old, but did he even at that age, could he understand your commands to him and requests? A. Oh, yeah.

Q. Did you say yes? A. Yes.

Mr. Bosch: I think that's all, Mrs. Remillard.

Cross-Examination

By Mr. Dunnavan:

Q. Mrs. Remillard, do you mind telling me your age? A. 39.

Q. 39. And you were born and raised in Montana, were you? A. Yes, sir. Denton.

Q. I am sorry.

A. Denton, D-e-n-t-o-n. [66]

Q. Denton, Montana. A. Yes.

Q. Your family were farmers there, were they?

A. Well, my father farmed there for a number of years and then we moved to town and he did work in town.

Q. He worked in town? A. Uh huh.

Q. And when were you and Mr. Remillard married? A. The 1st day of July, 1946.

Q. In Montana? A. Yes, sir.

Q. Is that the first marriage for both of you?

A. No, sir.

Q. Had you been married previously?

A. Yes, sir.

(Testimony of Agnes H. Remillard.)

Q. Do you have any children by any other marriage? A. No, sir.

Q. Had Mr. Remillard been married previously before? A. Yes, sir.

Q. Both once? A. Yes, sir.

Q. Once previously? A. That's right.

Q. Were you a widow, then, or were you divorced? A. Divorced. [67]

Q. Was Mr. Remillard divorced, too?

A. That's right.

Q. Now, were the natural parents of this child related by blood to you in any way, Mrs. Remillard? A. No, sir. Absolute strangers.

Q. They were strangers? A. That's right.

Q. They apparently left the child with you and left themselves and disappeared?

A. That's right. We have never heard from them since.

Q. Never heard from them. Now, when was it that you took the boy and came to Oregon, Mr. Remillard?

A. It was the last week in August, I believe.

Q. Of 1954? A. That's right.

Q. And from what I understand you and Mr. Remillard then separated, you were having——

A. Yes, sir.

Q. ——some difficulties, were you not——

A. (Witness nods head.)

Q. ——is that right? A. That's right.

Q. How long did those difficulties go on that led to your separation?

(Testimony of Agnes H. Remillard.)

A. Oh, since the last of July. [68]

Q. Since the last of July? A. Uh huh.

Q. Now, you came out to where your relatives were in Oregon? A. That's right.

Q. Brought the boy with you?

A. That's right.

Q. Did Mr. Remillard have any contact with the boy from that time on till the time of the accident?

A. Oh, yes; we wrote letters.

Q. Pardon me? A. We wrote letters.

Q. I see. But, I mean, did he see or visit the boy? A. No.

Q. Did you return to Montana, for example, during that interval? A. No.

Q. Was he notified of the accident?

A. Yes, sir.

Q. Did he come out here after the accident?

A. Yes, sir.

Q. Right away, was that?

A. Immediately.

Q. I see. Did he remain here, then, or has he since come here?

A. No. He was employed there so he went back.

Q. I see. [69] A. For a while.

Q. And then he has evidently moved out here since the accident? A. Yes, sir.

Q. You are living together now?

A. Yes, sir.

Q. With some cousin of his, is that—

A. Yes, sir. That's right.

Q. What is the name of that cousin?

(Testimony of Agnes H. Remillard.)

A. Daley.

Q. Daley? A. Yes, sir.

Q. Well, is Mr. Remillard related to the Daleys, too? A. Yes, sir.

Q. I see. He is a cousin of the Daleys and you are— A. That is right, sir.

Q. —and, you are a sister of the Daleys?

A. That is right. I am a sister of Mrs. Daley.

Q. Of Mrs. Daley? A. That is right.

Q. And he is related to the Daleys?

A. That is right.

Q. Which Daley is it that you live with, you and Mr. Remillard? A. Albert.

Q. Albert Daley? [70] A. Yes.

Q. You are not employed now, are you, Mrs. Remillard? A. No.

Q. But you had been apparently employed while you were in Oregon? A. Part time.

Q. That is, you were doing housekeeping work?

A. Yes; housekeeping and I worked at the school a few days, too.

Q. I see. A. Cooked there.

Q. Are you trained for any particular type of employment, Mrs. Remillard?

A. Yes. I have had telegraphic work, Western Union.

Q. Yes. I see. You attended high school in Montana? A. I did.

Q. Where was that? A. In Denton.

Q. That's Denton? A. That's right.

Testimony of Agnes H. Remillard.)

Q. And have you followed telegraphic work at

all? A. Not since I was out of service.

Q. I see. Since out of what? A. Service.

Q. You mean were you in the——

A. Wacs. [71]

Q. In the Wacs during the last——

A. Yes, sir. That's right.

Q. I see. This was before your marriage to Mr.

Remillard? A. Yes, sir.

Q. Since your marriage to Mr. Remillard, I take it, other than doing housekeeping work or this school work you have been just a housewife?

A. Yes, sir.

Q. Do you have an automobile at all, you and Mr. Remillard?

A. Yes. We have a 1941 Plymouth.

Q. I mean, at the time, however, this accident occurred you did not have a car, I take it?

A. No. I didn't have one at the time of the accident. The Plymouth was in Montana with him.

Q. Have you left—you and Mr. Remillard left Montana at all—I mean, you have left there, I suppose, and live here in permanent residence now?

A. Yes.

Q. Do you have any property left in Montana or anything of that sort?

A. Mr. Remillard has a property there, yes.

Q. This house he was talking about?

A. The house that he was living in at the time belongs to him. He built it.

Mr. Dunnavan: I see. That's all. [72]

(Testimony of Agnes H. Remillard.)

Redirect Examination

By Mr. Bosch:

Q. One thing, Mrs. Remillard.

A. Yes, sir.

Q. The Bailiff is handing you a picture which has been marked a plaintiff's exhibit. Will you please tell us what that is?

A. That is a picture of Eddie.

Q. At about how old?

A. He was about, I imagine, about 26 months old when that was taken.

Mr. Bosch: That's all. Thank you.

(Witness excused.) [73]

Reporters' Certificate

Ira G. Holcomb and Jack Ellis, official court reporters, hereby certify the foregoing to be a true, full and accurate transcript of our shorthand and stenotype notes taken of the testimony of Florence Daley, Edith Daley, Edward S. Remillard and Agnes H. Remillard, in the above-entitled case of to wit, May 24-25, 1955.

Dated at Portland, Oregon, this 1st day of September, 1955.

/s/ IRA G. HOLCOMB,

/s/ JACK ELLIS,

Official Court Reporters.

[Endorsed]: Filed October 3, 1955. [74]

PLAINTIFF'S EXHIBIT No. 1

The Dalles, Oregon, Dec. 8, 1954.

For Edward Stephan Remillard service.

In Account With

Spencer & Libby Funeral Home
Kelly Avenue at Tenth Street

| | |
|---------------------------------------|----------|
| Casket, Emb. and conduct funeral..... | \$135.00 |
| 1 Grave | 40.00 |
| 1 Cement Liner..... | 33.00 |
| 1 Open Grave..... | 15.00 |
| Minister | 10.00 |
| Singer | 5.00 |
| | <hr/> |
| | \$238.00 |

In the United States District Court
for the District of Oregon

CERTIFICATE OF CLERK

United States of America,
District of Oregon—ss.

I, R. DeMott, Clerk of the United States District Court for the District of Oregon, do hereby certify that the foregoing documents consisting of Complaint; Answer; Order, dated January 13, 1955; Pre-trial Order; Order Authorizing Substitution of Attorneys; Record of Trial Before Court; Memorandum of Decision; Findings of Fact and Conclusions of Law; Judgment; Objections to Findings of Fact and Conclusions of Law and Judgment; Order Overruling Objections to Findings of Fact and Con-

clusions of Law and Judgment; Notice of Appeal; Bond for Costs on Appeal; Motion and Stipulation for Filing Record and Docketing Appeal; Order Extending Time for Filing Record and Docketing Appeal; Statement of Points on Which Appellant Intend to Rely on Appeal; Stipulation of Record on Appeal; Order to Transport Original Exhibits and Transcript of Docket Entries constitute the record on appeal from a judgment of said court in a cause therein, numbered Civil 7891, in which Charles Cox and Albert Earl Jones are the defendants and appellants and Agnes H. Remillard, Administratrix of the Estate of Edward S. Remillard Deceased, is the plaintiff and appellee; that the said record has been prepared by me in accordance with the designation of contents of record on appeal filed by the appellant, and in accordance with the rules of this court.

I further certify that there is enclosed herewith plaintiff's exhibits No. 1 and 8 and a transcript of Testimony of Floyd Daley, Edith Daley, Edward S. Remillard and Agnes H. Remillard.

I further certify that the cost of filing the notice of appeal \$5.00 has been paid by the appellant.

In Testimony Whereof I have hereunto set my hand and affixed the seal of said court in Portland in said District, this 10th day of October, 1955.

R. DE MOTTE,

Clerk;

By /s/ F. L. BUCK,

Chief Deputy.

[Endorsed]: No. 14910. United States Court of Appeals for the Ninth Circuit. Charles Cox and Albert Earl Jones, Appellants, vs. Agnes H. Remillard, Administratrix of the Estate of Edward S. Remillard, Deceased, Appellee. Transcript of Record. Appeal from the United States District Court for the District of Oregon.

Filed October 21, 1955.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 14910

CHARLES COX and ALBERT EARL JONES,

Appellants,

vs.

AGNES H. REMILLARD, Administratrix of the
Estate of Edward S. Remillard, Deceased,

Appellee.

STATEMENT OF POINTS ON WHICH AP
PELLANTS INTEND TO RELY ON AP
PEAL

Come now Charles Cox and Albert Earl Jones appellants above named, by and through John Ryan of their attorneys, and for a statement of point on which they intend to rely on this appeal, say:

1. That the District Court erred in not holding unconstitutional, in the present case, the Oregon Wrongful Death Statute (ORS 30.020) under which this action was brought for benefit of the estate of a three-year-old decedent.

2. That the District Court erred by indulging in speculation in finding and awarding damages herein and in entering its conclusion of law that appellee is entitled to recover judgment against appellant in the sum of \$10,000.00 general damages and \$238.00 special damages.

3. That the District Court erred in finding and awarding damages which were excessive and not supported by a sufficiency of the evidence.

Dated this 21st day of October, 1955, at Portland, Oregon.

/s/ JOHN D. RYAN,

Of Attorneys for Appellants.

Service of copy acknowledged.

[Endorsed]: Filed October 25, 1955.

